IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs November 18, 2008

STATE OF TENNESSEE v. GREGORY DON SHAW

Direct Appeal from the Criminal Court for Greene County
No. 07CR272 John F. Dugger, Jr., Judge

No. E2008-00397-CCA-R3-CD - Filed August 10, 2009

A Greene County jury convicted the Defendant, Gregory Don Shaw, of one count of sale or delivery of less than 0.5 grams a Schedule II controlled substance. The trial court sentenced him as a Range I offender to five years in prison. The Defendant appeals, contending: (1) the trial court erred when it denied his motion for judgment of acquittal and motion for a new trial; (2) the trial court erred by admitting into evidence a voice recording that was not properly authenticated; (3) the trial court erred when it overruled the Defendant's objection to the chain of custody of the evidence; (4) the trial court erred when it sentenced him; and (5) the fine imposed by the trial judge was excessive. After thoroughly reviewing the record and applicable authorities, we affirm the trial court's judgment.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

ROBERT W. WEDEMEYER, J., delivered the opinion of the court, in which THOMAS T. WOODALL and JAMES CURWOOD WITT, JR., JJ., joined.

Timothy W. Flohr, Greeneville, Tennessee, for the Appellant, Gregory Don Shaw.

Robert E. Cooper, Jr., Attorney General and Reporter; Michael E. Moore, Solicitor General; Rachel West Harmon, Assistant Attorney General; C. Berkeley Bell, District Attorney General; Cecil C. Mills, Jr., Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

I. Facts

A. Trial

A Greene County Grand Jury indicted the Defendant for one count of sale or delivery of less than 0.5 grams of a Schedule II controlled substance. At his trial on this indictment, the

following evidence was presented: Earl Mysinger, an officer with the Greene County Sheriff's Department, testified that he met with a confidential informant named Amy Tunnel[1] on November 27, 2006, to arrange for her to purchase crack cocaine from the Defendant. Agent Mysinger[2] and another agent, Agent Fillers, met with the informant in the "staging area" for the operation, where they searched the informant and her car and equipped the informant with a transmitter that recorded her conversations and with another recording device, which they placed in her pocket. The agents also provided the informant with fifty dollars in prerecorded drug task force buy-money.

Agent Mysinger testified that the Defendant lived at 311 Locust Street, which was where the informant had arranged to meet the Defendant to purchase crack cocaine. After searching the informant and providing her with money, the agents followed her to the street immediately parallel to the Defendant's street. Thirty to forty-five seconds later, the agent heard her talking to someone inside the residence. Agent Mysinger heard the transaction take place, and, after the transaction, he followed the informant to the staging area, where they recovered a small amount of a white solid substance that field-tested positive for cocaine. The informant wrote a statement describing what had occurred, and the agents again searched her and her car.

Agent Mysinger said that the white substance was placed in an evidence bag and put inside the Sheriff's Department vault. Agent Fillers later took the substance to the Tennessee Breau of Investigations ("TBI") crime laboratory in Knoxville to be tested.

On cross-examination, Agent Mysinger described the search of the confidential informant and agreed that having another female agent search her more thoroughly would be appropriate but logistically difficult. The agent agreed that the informant could have hidden cocaine in her bra or in a body cavity. Agent Mysinger testified he did not have a K-9 officer search the informant's car, and he agreed she could have hidden a small rock of cocaine in her car. Agent Mysinger said he did not know of any previous relationship between the informant and the Defendant, and he did not know whether the informant had a reason to want the Defendant imprisoned. Agent Mysinger said that, based upon the conversation he monitored, he believed that the cocaine with which the informant returned was purchased from the Defendant. During that conversation, he heard the voices of four people: the informant; a man the informatn identified as "Greg"; another man named Tommy; and an unidentified female who left before the drug transaction occurred.

The agent acknowledged that the narrative that he prepared describing the events that occurred on November 27, 2006, reflected the date November 22, 2006. He explained that he

[1]The record reflects that the informant was deceased at the time of trial.

[2]The record reflects that Officer Mysinger refers to himself and a co-worker as Agent Mysinger and Agent Fillers, respectively.

made a mistake on the document. Agent Mysinger testified he did not see the Defendant on the day of the drug buy, and he had never asked him about the transaction.

James Fillers testified that he was employed by the Greeneville Police at the time of this drug transaction. He met the confidential informant with Agent Mysinger, and also present were Agent Tommy Snow and Agent Steve Lowe. The agents intended to have the informant purchase crack cocaine from the Defendant at 311 Locust Street. Agent Fillers confirmed much of Agent Mysinger's testimony, but he added that he recognized the informant's voice. He said he had listened to the audiotape of her voice, and he recognized her voice. Further, he said that he recognized the Defendant's voice on the audiotape. Agent Fillers testified that he had seen the transcription of the audiotape prepared by the State and that it appeared to be accurate.

At this point, the Defendant's counsel objected, stating that the Agent had testified that he recognized the Defendant's voice but that he had not said how he recognized it. The Defendant's counsel asked to voir dire the witness out of the presence of the jury, and the trial court granted this request. During that voir dire, Agent Fillers testified that he had been to the Defendant's residence on at least two prior occasions and that he had once arrested him for public intoxication. Agent Fillers said without reservation he was sure that the male voice in the recording was that of the Defendant. The trial court overruled the Defendant's objection but said it would not allow the State to question Agent Fillers about how he knew the Defendant's voice in front of the jury because such a line of questioning would be too prejudicial to the Defendant.

The jury was brought back in, and Agent Fillers testified further that he reunited with the informant thirty to forty-five seconds after the informant said "good bye" to the Defendant. The agent followed her to the staging area and retrieved the white rock-type substance. The agent secured the substance in an evidence bag and then searched the informant and her car. Agent Fillers took the evidence back to his headquarters where it was secured in a vault. The State attempted to introduce a photograph of the evidence, and Defendant's counsel objected to the chain of custody. The trial court asked Defendant's counsel if he was objecting to the photograph, and counsel answered affirmatively. The trial court asked Defendant's counsel if the photograph had been provided in discovery, and counsel said he was unsure. After a break, the State withdrew the photograph. The trial court then informed Defendant's counsel that with regard to the motion on chain of custody, it found that the chain of custody had been proven with reasonable certainty.

The audio recording was played for the jury. On the audio recording, Agent James is heard explaining that the confidential informant was going to go to the Defendant's house to purchase fifty dollars worth of crack cocaine. The recorder is, apparently, placed in the informant's pocket, and one can hear her driving. The informant's phone rings, and she says, "I'll be there in about three minutes. . . .Yeah, still same amount. . . . I'll be right there." She then says into the recorder, "Okay guys, I'm here."

A man is heard talking on the phone saying that he is busy. He then says that they should do what the informant "came here to do." A female is heard saying "he said that he'll be right here." The unidentified female then, apparently, leaves. The informant refers to the male voice

as "Greg," and the two converse for several minutes. They talk about someone buying a "quarter" and smoking "hit after hit" and then "it" weighing "1.6" after they smoked quite a bit of it. The informant and "Greg" appear to wait for another person to come in a yellow car. When the yellow car arrives, "Greg" leaves for a short period of time. "Greg" returns and asks the informant if she has a "good blade," and the informant responds "I have no kinda blade." Shortly thereafter, the informant says "yeah you hooked me up." "Greg" responds that it could have been better than that and it would be if the informant returned another time. The informant thanks "Greg" and leaves, returning to the agents conducting the investigation.

On cross-examination, Agent Fillers testified that he could see the Defendant's street, but not his residence, during the drug transaction. The agent agreed that two transcripts of the conversation were created and that one of them may have contained some errors. Agent Fillers, however, testified without objection that he knew the Defendant participated in the transaction based upon not only what he heard on the tape but also upon the confidential informant's statements to him. Agent Fillers conceded that another man named Tommy was present during this transaction and that Tommy could have participated in the transaction. He said, however, that from the audio recording and the informant's statement he believed that the Defendant sold the informant the drugs.

Jacob White, a special agent forensic scientist with the TBI, testified that the evidence in this case came to him sealed in a zip lock bag, which was sealed inside an evidence envelope. Inside the baggie, he found a rock-like substance that he tested and determined was 0.3 grams of cocaine.

The Defendant moved for a judgment of acquittal, which the trial court denied. The jury found the Defendant guilty of one count of sale or delivery of 0.5 grams or less of a Schedule II controlled substance and set a fine of one hundred thousand dollars.

B. Sentencing Hearing

At the Defendant's sentencing hearing, the trial court admitted the presentence investigation report, which showed that the Defendant had previously been convicted of aggravated assault, a felony, and several misdemeanors, at least two of which were for violating his probation. The parties agreed that the Defendant was a Range I standard offender and neither party offered any additional proof. The trial court found:

> I have looked at the mitigating and enhancement factors. I do not find that any mitigating factors apply.
>
> [Defendant], I looked at the enhancement factors and, clearly, number one, the defendant has a previous history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range.
>
> I think that particular enhancement factor standing alone is sufficient to move the defendant up the range of punishment within his range as being a range one offender.
>
> . . . .

The defendant's presentence report shows that he has convictions, basically, that go back . . . to the date of this offense, 23 years.

In 1983, he had an interfering with an officer in General Sessions Court, an assault and battery, a speeding, paid a fine on buying beer under age.

Then on December 14th, 1983, he was convicted of the violation of the Tennessee Drug Control Act, and that was the first drug offense, which . . . he was convicted on April 3rd, 1984, which was 22 years from the date of this offense. He was guilty of simple possession of marijuana.

In addition, he had paid a fine on possession of less than one half ounce of marijuana on January 9, 1987, in General Session Court of Greene County.

In Criminal Court of Greene County on September 18th, 1987, simple possession of a controlled substance by casual exchange. In '88, assault and battery, General Sessions Court, P.I., fine in General Session Court.

In the Criminal Court of Greene County on February the 2nd, 1990, he received a three year sentence for an aggravated assault; and subsequently, on May 10, 1991, his probation was revoked.

On February the 2nd, 1990, he was convicted of assault and battery in the Criminal Court of Greene County.

Public intoxication, February the 25th, 1991, in the General Session Court of Greene County.

Public intoxication January 20th, 1992, in the General Session Court of Greene County.

February the 10th, 1992, of driving under the influence in the General Session Court of Greene County.

Criminal Court of Greene County, convicted of driving under the influence, second offense on May 21st, 1993.

Driving on revoked license, Criminal Court of Greene County, February 21st, 1993.

Public intoxication convictions, General Session Court, 2-19-93, 3-8-1993.

He has a violation of probation on May 5th, 1993 in the General Sessions Court of Greene County for driving under the influence.

He was convicted on May 21st, 1993, of driving under the influence, but he has a violation of probation out of case number 108239.

He has a violation out of Criminal Court in January 14th, 1994.

Public intoxication convictions February 11th, 1994, General Sessions Court of Greene County.

. . . .

Failure to appear, General Session Court of Greene County on 4-15-94.

Carrying firearms, 4-15-94, General Session Court of Greene County.

Violations of probation, again, 12-18-95.

An open container fine on 1-20-97.

Driving under the influence, third offense in the Green County Sessions Court, 1-20-97.

. . . .

> Conviction, General Sessions Court of Greene County, on 6-11-01, driving under the influence, a multiple offense, where you received 11 months 29 days, suspended to 150 days, and that was on June 11, 2001.
>
> Public intoxication convictions on 5-25-01, 6-13-01. Public intoxication on 6-16-04, 8-06-04.

The trial court noted that this evidence showed a long history of criminal behavior. The trial court stated that confinement was necessary to protect society from the Defendant, who had a long history of criminal conduct. Further, it said that measures less restrictive than confinement had frequently or recently been applied unsuccessfully to the Defendant and that there was a lack of potential for his rehabilitation. The trial court acknowledged that this was a relatively small quantity of cocaine and a relatively small amount of money. Based upon this, the trial court sentenced the Defendant to five years in prison with a thirty percent release eligibility and imposed the fine of $100,000 set by the jury.

II. Analysis

On appeal, the Defendant contends: (1) the trial court erred when it denied his motion for judgment of acquittal and motion for a new trial; (2) the trial court erred by admitting into evidence a voice recording that was not properly authenticated; (3) the trial court erred when it overruled the Defendant's objection to the chain of custody of the evidence; (4) the trial court erred when it sentenced him; and (5) the fine imposed by the trial court was excessive.

A. Motion for Judgment of Acquittal

The Defendant contends that the trial court should have granted his motion for judgment of acquittal or, in the alternative, that the evidence is insufficient to sustain his conviction. The Defendant asserts that neither of the agents involved saw the transaction occur and that the jury heard an audio recording insufficient to prove the Defendant's identity. The Defendant notes that the State had the recording transcribed twice, with two different results. The State counters that the proof shows that the agents properly utilized a confidential informant in a controlled buy, and the Defendant was the seller in that transaction.

We apply the same standard when reviewing whether a trial court erred in denying a motion for judgment of acquittal as when reviewing whether the evidence was sufficient to sustain a conviction. *See State v. Ball*, 973 S.W.2d 288, 292 (Tenn. Crim. App. 1998); *State v. Adams*, 916 S.W.2d 471, 473 (Tenn. Crim. App. 1995). When an accused challenges the sufficiency of the evidence, this Court's standard of review is whether, after considering the evidence in the light most favorable to the State, "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *see* Tenn. R. App. P. 13(e), *State v. Goodwin*, 143 S.W.3d 771, 775 (Tenn. 2004) (citing *State v. Reid*, 91 S.W.3d 247, 276 (Tenn. 2002)). This rule applies to findings of guilt based upon direct evidence, circumstantial evidence, or a combination of both direct and circumstantial evidence. *State v. Pendergrass*, 13 S.W.3d 389, 392-93 (Tenn. Crim. App. 1999). A conviction may be based entirely on circumstantial evidence where the facts are "so clearly

interwoven and connected that the finger of guilt is pointed unerringly at the Defendant and the Defendant alone." *State v. Smith*, 868 S.W.2d 561, 569 (Tenn. 1993). In such cases, however, the facts must be "so clearly interwoven and connected that the finger of guilt is pointed unerringly at the Defendant and the Defendant alone." The jury decides the weight to be given to circumstantial evidence, and "[t]he inferences to be drawn from such evidence, and the extent to which the circumstances are consistent with guilt and inconsistent with innocence, are questions primarily for the jury." *State v. Rice*, 184 S.W.3d 646, 662 (Tenn. 2006) (citations omitted).

In determining the sufficiency of the evidence, this Court should not re-weigh or re-evaluate the evidence. *State v. Matthews*, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990). Nor may this Court substitute its inferences for those drawn by the trier of fact from the evidence. *State v. Buggs*, 995 S.W.2d 102, 105 (Tenn. 1999); *Liakas v. State*, 286 S.W.2d 856, 859 (Tenn. 1956). "Questions concerning the credibility of the witnesses, the weight and value of the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact." *State v. Bland*, 958 S.W.2d 651, 659 (Tenn. 1997); *Liakas*, 286 S.W.2d at 859. "A guilty verdict by the jury, approved by the trial judge, accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the theory of the State." *State v. Cabbage*, 571 S.W.2d 832, 835 (Tenn. 1978); *State v. Grace*, 493 S.W.2d 474, 479 (Tenn. 1973). The Tennessee Supreme Court stated the rationale for this rule:

> This well-settled rule rests on a sound foundation. The trial judge and the jury see the witnesses face to face, hear their testimony and observe their demeanor on the stand. Thus the trial judge and jury are the primary instrumentality of justice to determine the weight and credibility to be given to the testimony of witnesses. In the trial forum alone is there human atmosphere and the totality of the evidence cannot be reproduced with a written record in this Court.

Bolin v. State, 405 S.W.2d 768, 771 (Tenn. 1996) (citing *Carroll v. State*, 370 S.W.2d 523 (Tenn. 1963)). This Court must afford the State of Tennessee the strongest legitimate view of the evidence contained in the record, as well as all reasonable inferences which may be drawn from the evidence. *Goodwin*, 143 S.W.3d at 775 (citing *State v. Smith*, 24 S.W.3d 274, 279 (Tenn. 2000)). Because a verdict of guilt against a defendant removes the presumption of innocence and raises a presumption of guilt, the convicted criminal defendant bears the burden of showing that the evidence was legally insufficient to sustain a guilty verdict. *State v. Carruthers*, 35 S.W.3d 516, 557-58 (Tenn. 2000).

The Defendant in this case was convicted of one count of sale or delivery of less than 0.5 grams of a Schedule II controlled substance. The Defendant complains that his identity as the seller was not sufficiently proven by the evidence presented at trial. Of course, the identity of the perpetrator is an essential element of any crime. *See State v. Thompson*, 519 S.W.2d 789, 793 (Tenn. 1975). We have reviewed the audio recording made by the confidential informant in this case. That recording clearly depicts the man named "Greg" preparing the crack cocaine for sale and then selling the cocaine. Further, he is heard telling the informant that he will give her an even better deal if she comes again. Agent Fillers was familiar with the Defendant and

recognized his voice on the audio recording. Issues of credibility and identity are questions reserved for the jury. The jury by its verdict accredited the testimony of Agent Fillers as was their prerogative. *See State v. Summerall*, 926 S.W.2d 272, 275 (Tenn. Crim. App. 1995). In our view, the evidence was sufficient for a rational trier of fact to have found beyond a reasonable doubt that the Defendant was the individual who delivered the crack cocaine to the confidential informant.

The Defendant further complains that the State had the audio recording transcribed twice, with two different results. As the jury was instructed, the transcription of the recording is not the evidence, but, rather, the recording itself is the evidence. The fact that the recording was transcribed differently on another occasion is of little consequence. Further, it is not apparent from the record or from the Defendant's brief how one of the transcriptions differed and how that was of any import.

We conclude that the evidence is sufficient to sustain the Defendant's conviction, and the trial court, therefore, did not err when it denied the Defendant's motion for judgment of acquittal.

B. Voice Recording

The Defendant next contends that the audio recording of the transaction was not properly authenticated by the State. The Defendant acknowledges that Agent Fillers' identification of the Defendant's voice comports with the rules of evidence but suggests that Agent Fillers' brief encounters with the Defendant "do not lay a proper foundation for establishing that the voice on the recording is that of [the Defendant]." The State counters that the trial court properly admitted Agent Fillers' testimony.

Tennessee Rule of Evidence 901 governs the authentication of evidence. Specifically, the rule provides that authentication may be made by "[i]dentification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker." Tenn. R. Evid. 901(b)(5). Specifically, one authority has noted that:

> [I]f the witness has, at the time of testifying, adequate familiarity with the speaker's voice, he or she may opine whether the disputed testimony is the alleged speaker's voice, Rule 901(b)(5). Familiarity can be gained in a relatively short period of time, and as the result of conversations occurring before or after the conversation that was identified.

Neil P. Cohen et al., *Tennessee Law of Evidence*, § 9.01[7], at 9-11 (LEXIS Publishing, 4th ed. 2000). "For authentication purposes, voice identification by a witness need not be certain; it is sufficient if the witness thinks he can identify the voice and express his opinion." *Stroup v. State*, 552 S.W.2d 418, 420 (Tenn. Crim. App. 1977). A trial court's ruling on the authentication of evidence will not be overruled absent an abuse of discretion. *State v. Stanley Philip Chapman*, No. W2004-02404-CCA-R3-CD, 2005 WL 2878162, at *14-15 (Tenn. Crim. App., at

Jackson, Nov. 22, 2005), *perm. app. denied* (Tenn. Mar. 27, 2006); *State v. Arnold Jones*, No. M1999-00851-CCA-R3-CD, 2000 WL 1843415, *4 (Tenn. Crim. App., at Nashville, Dec. 14, 2000), *no Tenn. R. App. P. 11 application filed*.

In the case under submission, Agent Fillers testified that he had been to the Defendant's residence on at least two prior occasions and that he once arrested him for public intoxication. Agent Fillers said without reservation he was sure that the male voice in the recording was that of the Defendant. As previously stated, "Familiarity can be gained in a relatively short period of time . . . ." We conclude that the trial court did not abuse its discretion when it admitted the audio recording of the drug transaction.

C. Chain of Custody

The Defendant next contends that the trial court erred when it overruled his objection to the chain of custody of the evidence. He asserts that "there is simply no way of proving that anything that the deceased confidential informant gave to police was provided to her by [the Defendant]." He notes that both officers testified that they retrieved the crack cocaine from the informant after the drug transaction but that they also testified that the informant was out of their view for at least a minute. The State counters that the Defendant failed to raise this issue in his written motion for new trial and that it is, therefore, waived.

The State correctly notes that the Defendant failed to raise this issue in his motion for a new trial. Accordingly, we find that the Defendant failed to preserve this issue for appeal pursuant to the Tennessee Rules of Appellate Procedure. *See* Tenn. R. App. P. 3(e), and 36(a). We must treat this issue as waived unless it is deemed to be plain error. Tenn. R. App. P. 52(b). Plain error requires that five factors be established: (1) "the record must clearly establish what happened in the trial court"; (2) "a clear and unequivocal rule of law must have been breached"; (3) "a substantial right of the accused must have been adversely affected"; (4) "the accused did not waive the issue for tactical reasons"; and (5) "consideration of the error is necessary to do substantial justice." *State v. Adkisson*, 899 S.W.2d 626, 641-42 (Tenn. Crim. App. 1994). Because our review of the record does not indicate that a clear and unequivocal rule of law was breached, no plain error occurred, and we conclude that the Defendant is not entitled to relief on this issue.

D. Sentencing

The Defendant contends that the trial court erred when it sentenced him by "incorrectly applying sentencing considerations." He asserts that the sentenced imposed should be no greater than that deserved for the offense committed and that, therefore, he should be sentenced to three years, the minimum for a Range I offender convicted of a class C felony. Further, the Defendant asserts that the trial court should have considered several mitigating factors. The State counters that the evidence, including the Defendant's lengthy criminal history and the severity of the offense, supports the trial court's enhancement of the Defendant's sentence by two years.

When a defendant challenges the length and manner of service of a sentence, it is the duty of this court to conduct a de novo review of the record with a presumption that "the

determinations made by the court from which the appeal is taken are correct." T.C.A. § 40-35-401(d) (2003). This presumption is "conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." *State v. Ross*, 49 S.W.3d 833, 847 (Tenn. 2001); *State v. Pettus*, 986 S.W.2d 540, 543 (Tenn. 1999); *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991). The presumption does not apply to the legal conclusions reached by the trial court in sentencing a defendant or to the determinations made by the trial court that are predicated upon uncontroverted facts. *State v. Dean*, 76 S.W.3d 352, 377 (Tenn. Crim. App. 2001); *State v. Butler*, 900 S.W.2d 305, 311 (Tenn. Crim. App. 1994); *State v. Smith*, 891 S.W.2d 922, 929 (Tenn. Crim. App. 1994). If our review reflects that the trial court followed the statutory sentencing procedure, imposed a lawful sentence after having given due consideration and proper weight to the factors and principles set out under the sentencing law, and made findings of fact that are adequately supported by the record, then we may not modify the sentence, even if we would have preferred a different result. *State v. Fletcher*, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991). We will uphold the sentence imposed by the trial court if: (1) the sentence complies with the purposes and principles of the Sentencing Act; and (2) the trial court's findings are adequately supported by the record. *See State v. Arnett*, 49 S.W.3d 250, 257 (Tenn. 2001). The burden of showing that a sentence is improper is upon the appealing party. *See* T.C.A. § 40-35-401 Sentencing Comm'n Cmts.; *Arnett*, 49 S.W.3d at 257.

In conducting a de novo review of a sentence, we must consider: (a) any evidence received at the trial and/or sentencing hearing; (b) the presentence report; (c) the principles of sentencing; (d) the arguments of counsel relative to sentencing alternatives; (e) the nature and characteristics of the offense; (f) any mitigating or enhancement factors; (g) any statements made by the defendant on his or her own behalf; and (h) the defendant's potential or lack of potential for rehabilitation or treatment. *See* T.C.A. § 40-35-210 (1997 & Supp. 2002); *State v. Taylor*, 63 S.W.3d 400, 411 (Tenn. Crim. App. 2001).[3] The party challenging a sentence imposed by the trial court has the burden of establishing that the sentence is erroneous. T.C.A. § 40-35-401 (2006), Sentencing Comm'n Cmts. To facilitate appellate review, the trial court is required to place on the record its reasons for imposing the specific sentence, including the identification of the mitigating and enhancement factors found, the specific facts supporting each enhancement factor found, and the method by which the mitigating and enhancement factors have been evaluated and balanced in determining the sentence. *See State v. Samuels*, 44 S.W.3d 489, 492 (Tenn. 2001).

In the case under submission, our review of the record indicates that the trial court followed the statutory sentencing procedure, thus our de novo review is performed with the presumption of correctness. The trial court enhanced the Defendant's sentence by two years

[3]Effective June 7, 2005, Tennessee Code Annotated sections 40-35-114 and 40-35-210 were rewritten in their entirety. *See* Tenn. Pub. Acts, ch 353, §§ 5,6. These sections were replaced with language rendering the enhancement factors advisory only and abandoning a statutory minimum sentence. *See* T.C.A. §§ 40-35-114 (2005) ("[t]he court shall consider, but is not bound by, the following advisory factors in determining whether to enhance a defendant's sentence"); -35-210(c) ("In imposing a specific sentence within the range of punishment, the court shall consider, but is not bound by, the following advisory sentencing guidelines."

based upon his long history of criminal behavior, the fact that measures less restrictive than confinement had frequently or recently been applied unsuccessfully to the Defendant, and the fact that there was a lack of potential for the Defendant's rehabilitation. The trial court acknowledged that this was a relatively small quantity of cocaine and a relatively small amount of money. However, as listed above, the Defendant indeed has a long history of criminal convictions, some of which include convictions for violation of his probation. In light of our review of the Defendant's extensive criminal history, which shows an inability to comply with the law and a tendency for violence, we will not disturb the trial court's decision to enhance the Defendant's sentence by two years. The Defendant is not entitled to relief on this issue.

E. Fine

Finally, the Defendant contends that the trial court erred when it imposed the one hundred thousand dollar fine set by the jury. The Defendant asserts that the trial court should have considered his ability to pay and lessened the financial burden on an indigent defendant. The State counters that the evidence, including the Defendant's lengthy criminal history and the severity of the offense, supports the trial court's imposition of the maximum fine.

Appellate review clearly extends to the imposition of fines. *State v. Taylor*, 70 S.W.3d 717, 722 (Tenn. 2002) (citing *State v. Bryant*, 805 S.W.2d 762, 767 (Tenn. 1991)). When an offense is punishable by a fine in excess of $50, it is the jury's responsibility to set a fine, if any, within the ranges provided by the legislature. *See* T.C.A. § 40-35-301(b) (2003). The trial court, in imposing the sentence, shall then impose a fine in an amount not to exceed the fine fixed by the jury. T.C.A. § 40-35-301(b).

The trial court's imposition of a fine is to be based upon the factors provided by the 1989 Sentencing Act, which includes the defendant's ability to pay the fine. *See State v. Marshall*, 870 S.W.2d 532, 542 (Tenn. Crim. App. 1993), *overruled on other grounds by State v. Carter*, 988 S.W.2d 145, 149 (Tenn. 1999), *as recognized in State v. Smith*, 996 S.W.2d 845, 847-48 (Tenn. Crim. App. 1999). A defendant's ability to pay, however, is not the controlling factor. *State v. Butler*, 108 S.W.3d 845, 853 (Tenn. 2003); *State v. Alvarado*, 961 S.W.2d 136, 153 (Tenn. Crim. App. 1996) (citations omitted). We note that indigence itself does not exempt a defendant from a fine. *Alvarado*, 961 S.W.2d at 153. A fine "is not automatically precluded because it works a substantial hardship on the defendant it may be punitive in the same fashion incarceration may be punitive." *State v. Jimmy Wayne Perkey*, No. E2002-00772-CCA-R3-CD, 2003 WL 21920255, at *4 (Tenn. Crim. App., at Knoxville, Aug. 12, 2003), *perm. app. denied* (Tenn. 2003). Other relevant factors include prior history, potential for rehabilitation, and mitigating and enhancement factors that are relevant to an appropriate overall sentence. *See State v. Blevins*, 968 S.W.2d 888, 895 (Tenn. Crim. App. 1997). The seriousness of a conviction offense may also support a punitive fine. *See State v. Alvarado*, 961 S.w.2d 136, 153 (Tenn. Crim. App. 1996).

In the case under submission, we find in the record no evidence or argument presented to the trial court as to why the trial court should not approve the fine that the jury set. Further, considering the Defendant's extensive criminal history, his failure to comply with probation, and

the seriousness of the offense, we conclude that the punitive nature of the fine is adequately supported by the record. In our estimation, the Defendant has not shouldered his burden on appeal to show why the fine is excessive. *See Butler*, 108 S.W.3d at 852.

III. Conclusion

Based on the foregoing reasoning and authorities, we affirm the judgment of the trial court.

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ROBERT W. WEDEMEYER, JUDGE